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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STEPHEN SCALLON,

Petitioner and Appellant,

v.

CITY OF LOS ANGELES, et al.

Defendants and Respondents.

B286075

(Los Angeles County  
Super. Ct. No. BS161617)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Rains Lucia Stern St. Phalle & Silver, Jacob A. Kalinski and Gidian R. Mellk for Petitioner and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendants and Respondents.

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Officer Stephen Scallon (Scallon) is a 25-year Los Angeles Police Department (LAPD) veteran with over 18 years' experience with the Special Weapons and Tactics (SWAT) team. On May 24, 2014, Scallon deployed his Taser while attempting to take a potentially suicidal male jumper into custody. That man, Carlos Ocana (Ocana), fell off the parapet ledge of a downtown market and died when he struck the ground below. An administrative adjudication resulted in two counts of misconduct against Scallon for using force and tactics that substantially deviated from approved LAPD training. Scallon also received an official reprimand for his actions. Scallon filed an administrative appeal and the chief of police, Charlie Beck (Chief Beck), sustained the misconduct counts as well as the penalty of an official reprimand. Scallon then sued the City of Los Angeles and Chief Beck, filing a petition for peremptory writ of mandate in superior court. The trial court denied the petition. We affirm the trial court.

## **BACKGROUND**

On May 24, 2014, Scallon was the on-call team leader on tactics for the LAPD Metropolitan Division's SWAT team. At approximately 8:30 a.m. that day, a security guard at the Four Corners Market called 911 and reported that a man (Ocana) was on the roof of the market. LAPD Officers Joseph Dudas and Alexander Voorhees arrived at the market at 9:27 a.m. and spotted Ocana on the roof. When the officers called out to Ocana, he began climbing up the ladder of a billboard that was attached to the roof. He climbed to the top of the billboard and sat down with his feet hanging over the edge. The officers then requested an airship, additional units, and a supervisor. Sergeant Victor

Salguero and Officers Christabel Youssef, Conception Guzman, Denny Leopoldo, and Sterling Byrd responded to the location. Officers Dudas, Voorhees, Youssef, and Guzman went up to the roof and tried to talk Ocana down from the billboard, but he refused to climb down. Air Support Officers Renee Vidriezca and Kevin Cook arrived in a helicopter and saw Ocana on top of the billboard. They asked for the assistance of the Los Angeles Fire Department (LAFD).

At about 9:45 a.m., Sergeant Salguero arrived and assumed the role of incident commander. He saw Ocana rocking back and forth while sitting on top of the billboard and noted that Ocana appeared to be under the influence of drugs or was possibly suffering from a mental illness. At about 10:00 a.m., the LAFD arrived and deployed two airbags. One airbag was placed on the rooftop under the billboard while the other was placed in the parking lot along the building's east wall. Sergeant Salguero then requested the assistance of SWAT team. Lieutenant Daniel Bunch approved deployment of the SWAT team and directed Scallon to take Ocana into custody if the opportunity presented itself.

At about 10:20 a.m., Lieutenant Christopher Merlo arrived and became the incident commander. Scallon arrived shortly after that. As the team leader, it was Scallon's responsibility to deploy all the SWAT officers. Scallon spoke with Lieutenant Merlo and Officer Ivan Ramos, the first SWAT officer to arrive, and learned that Ocana had climbed down from the billboard, grabbed a bottle of orange juice, and climbed back up onto the billboard. Scallon was told that Ocana had been up on the billboard for two hours and that the officers had missed the chance to take him into custody at least once, when he came

down the billboard ladder. Scallon scouted the location and did not see any gaps between the airbag and the market wall. Scallon was also told that Ocana was known for being a climber and for fighting with officers.<sup>1</sup>

Scallon positioned SWAT Officers James Hart, David Keortge, Ramos, and James Gastelo on the rooftop to act as the negotiations and rescue team. Scallon made sure that Officers Hart and Keortge were tied-off to LAFD truck ladders so they would not fall over the edge of the building if they had to grab Ocana. Other SWAT and patrol officers were also on the rooftop and on the ground. Officer Hart tried speaking with Ocana in English while Officer Ramos tried speaking with him in Spanish, but Ocana did not respond to their requests that he come down from the top of the billboard. Instead, Ocana maneuvered around the billboard and sat on top of the billboard with his legs dangling over the edge. He appeared to be under the influence of drugs and seemed to fall asleep at times. Scallon saw that Ocana was “very unsteady” at one point and looked like he was nodding off while lying on top of the billboard, 40 feet above the ground. Scallon also worried that Ocana was thinking about committing suicide by jumping off the top of the billboard.

In a plan he discussed with Officers Hart, Keortge, and others, Scallon decided that if Ocana came back down from the billboard he would not be allowed to climb back up. Scallon

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<sup>1</sup> A detective also broadcast the following over the SWAT frequency: “Steve, he’s known as Carlos Ocana. He speaks limited English. Basic instructions only. He’s known to fight with officers, even after being handcuffed and hobbled. Recently got out for robbery. Cocaine user. No known contagions or needle usage.”

assigned himself the less-lethal Taser and assigned Officer Howard Ng the less-lethal .40 millimeter munitions launcher. Officer Anzaldo was assigned lethal coverage.<sup>2</sup> Officers Hart and Keortge, who were still tied-off for safety, would grab hold of Ocana if the opportunity presented itself. Ocana asked for a cigarette and said he would surrender after smoking it. Officer Hart offered Ocana a cigarette and Ocana began climbing down from the top of the billboard to the ladder and then down the billboard ladder. Officer Hart moved forward, placed the cigarette on top of some pallets leaning against the inside of the parapet directly under the billboard ladder, and backed away. Ocana came down to the parapet ledge and sat on the ledge with his legs hanging down towards the rooftop and his feet resting on the pallets.<sup>3</sup>

Although Scallon was unaware of this at the time, LAFD personnel on the ground had adjusted the airbag when Ocana moved down from the billboard, which caused a gap between the

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<sup>2</sup> According to LAPD protocol, a Taser “may be used on suspects who are violent, or who pose an immediate threat to themselves or others,” when the officer believes that attempts to subdue the suspect with other tactics have been or will likely be ineffective in the situation or there is a reasonable belief that it will be unsafe for officers to approach within contact range of the suspect. However, an officer should generally avoid using a Taser when the suspect is in danger of falling and the fall would likely result in death or serious bodily injury.

<sup>3</sup> The distance from the top of the billboard to the parking lot below was over 40 feet. The distance from the top of the billboard to the rooftop was over 27 feet. The distance from the parapet ledge to the parking lot was over 15 feet.

airbag and the building's wall.<sup>4</sup> Once seated on the ledge, Ocana began smoking the cigarette. Scallon believed Ocana would surrender after smoking the cigarette but was prepared to use his Taser if Ocana fought with the officers. Scallon unholstered the Taser and concealed it behind his leg while Ocana sat on the ledge, smoking and talking with Officer Ramos in Spanish. Scallon was about five or six feet away from Ocana. Officers Hart and Keortge were about eight to 10 feet away from Ocana.

Before finishing his cigarette, Ocana suddenly turned to his left and grabbed onto a rung of the billboard ladder. Ocana then looked over his right shoulder in Scallon's direction and pulled himself towards the ladder. According to Scallon, Ocana was completely off the wall and positioned toward the inside of the wall with his legs extended down towards the rooftop. Scallon then deployed his Taser without warning in order to incapacitate Ocana and prevent him from climbing back up the ladder. At the same time, Officers Hart and Keortge moved towards Ocana. Ocana let go of the ladder rung about half way through the five-second tasing and his momentum carried him over the parapet ledge. Using both hands, Officer Keortge grabbed Ocana's right leg above the knee but was unable to maintain his grasp due to Ocana's body weight and momentum. Ocana fell over the wall and landed on the pavement below, between the wall and the airbag. Ocana died as a result of blunt force trauma to his head.

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<sup>4</sup> The airbag could not be placed flush against the east wall due to offset walls and a billboard post.

## **PROCEDURAL HISTORY**

### **I. Investigation and Reprimand**

Scallon's Taser deployment led to a categorical use of force investigation by the LAPD's Force Investigation Division (FID). The investigation lasted eight months and resulted in an over 1700-page report.

After a categorical use of force investigation is completed, the FID report goes to the involved officer's commanding officer as well the LAPD's Inspector General and Use of Force Review Board. The Use of Force Review Board then makes a recommendation to the chief of police, who submits an independent recommendation to the Board of Police Commissioners (also known as the Police Commission). The Police Commission has the final authority to determine whether an officer's use of force was "in-policy" or "out of policy." The chief of police has three alternatives for discipline when an officer's use of force is found to be out of policy: (1) order extensive retraining; (2) issue a notice to correct; or (3) initiate a personnel complaint investigation.

Here, the Use of Force Review Board found that Scallon's use of tactics merited an "Administrative Disapproval" and determined that Scallon's use of force was "In Policy (No Further Action)." Chief Beck submitted a report to the Police Commission regarding Scallon's tactics and use of force. Chief Beck had reviewed the majority and minority opinions of the Use of Force Review Board, adopting the majority opinion's finding that Scallon's tactics merited an administrative disapproval as well as the minority opinion's determination that Scallon's use of force was out of policy.

Chief Beck noted that “[o]fficers must . . . act collectively and as a team to ensure the success of any tactical incident. The failure to communicate and coordinate their tactical options can hinder their effectiveness.” Chief Beck found that Scallon had substantially deviated from the tactical plan when he deployed his Taser without adequately communicating to the tactical team and before Officers Hart or Keortge moved to grab Ocana. Chief Beck concluded that Scallon’s use of force was out of policy because, when the Taser was deployed, Ocana was in danger of falling off the ledge in a way that would likely result in death or serious injury. The Police Commission adopted Chief Beck’s recommendation that Scallon’s tactics be adjudicated as an “Administrative Disapproval” and that his use of force be determined “Out of Policy (Administrative Disapproval).”

Chief Beck then directed that a personnel complaint be investigated and adjudicated regarding the incident. Once the personnel complaint investigation was completed, Scallon’s commanding officers recommended that Chief Beck sustain the allegations against Scallon for using tactics and force which substantially deviated from approved LAPD training, and that Chief Beck officially reprimand Scallon. Chief Beck issued an official reprimand against Scallon for using tactics and force that substantially deviated from approved LAPD training.

## **II. Administrative Appeal**

Scallon appealed the misconduct findings as well as the official reprimand. At the administrative appeal hearing, Scallon testified that “the basic plan was not to allow [Ocana] to go back up” the billboard ladder. Officers Hart and Keortge were tied-off with climbing harnesses and Scallon told them that if Ocana



tried to go back up the ladder, “their primary mission was to put hands on [Ocana] and hold on to him.” Scallon said he was aware of the LAPD’s policy that an officer should generally avoid using a Taser when the suspect is in an elevated position and in danger of a fall that would likely result in death or serious bodily injury.

Sergeant Stacy Lim testified as an expert regarding the training of LAPD officers when deploying a Taser. Sergeant Lim is in charge of the Tactics Unit, which provides in-service tactical training for LAPD’s Training Division. Sergeant Lim said that Scallon’s Taser use fell within the parameters of what she teaches. She determined the tactical plan was to prevent Ocana from climbing back up the billboard ladder by using “whatever means they had” at the time and opined that the Taser “was the only feasible thing they had,” except for the two tied-off officers “that were going to grab a hold of [Ocana].”<sup>5</sup> Therefore, “if they couldn’t go directly hands on, they [would] have to use a Taser.” She noted that officers should not deploy a Taser if doing so could result in serious injury to the suspect and that the officers should ensure the suspect is a danger to himself or others before deploying the Taser. However, she believed Scallon’s Taser

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<sup>5</sup> According to the trial court, Sergeant Lim’s opinion was based on a faulty understanding of the tactical plan. “There is a difference between a goal and the tactical plan for achieving that goal,” the court noted. While the goal may have been to prevent Ocana from re-ascending the billboard, “the concrete tactical plan for achieving that goal ‘was to have Officers Keortge and Hart, who were tied in with ropes, move forward and grab onto Ocana if the opportunity presented itself.’” According to the trial court, there was no evidence deployment of a Taser was any part of that tactical plan. To the contrary, the Taser was only an option to deal with a potential altercation or fight.

deployment was an in-policy use of force because she determined Ocana would not have been injured by falling three feet from the parapet ledge to the rooftop and, based on what firefighters said, a fall from the parapet ledge onto the airbag would not cause serious injury.

On December 3, 2015, the hearing officer handed down his decision. With respect to Scallon's official reprimand, the hearing officer's report stated: "Cause does not exist to discipline [Scallon] for alleged use of force and tactics that substantially deviated from approved [LAPD] training." The hearing officer found it objectively reasonable for Scallon to assume that "the two climbers standing by to grab Ocana would follow their plan" and that "if Ocana fell, the airbag on the ground below would safely break Ocana's 15-foot fall." The hearing officer concluded that Scallon's use of force and tactics were reasonable and complied with approved LAPD training. The hearing officer recommended that the adjudication of the misconduct charges be changed to " 'Not Sustained' " and that Chief Beck adopt a finding of " 'No Misconduct' " in the matter.

On January 6, 2016, Chief Beck issued his order and decision rejecting the hearing officer's recommendations. Chief Beck determined that Scallon's use of force substantially deviated from approved LAPD training. Scallon had deployed his Taser when Ocana was in a position to fall off the roof but knew that an officer should avoid using a Taser when a suspect could be in danger of falling and such a fall would likely result in death or serious bodily injury. Chief Beck found that Scallon's tactics had substantially deviated from approved LAPD training because Scallon had deployed the Taser without warning or cause and at a time when Officers Hart and Keortge were out of position, a

fact Officer Scallon knew. Thus, Chief Beck sustained the two misconduct counts as well as the penalty of an official reprimand.

### **III. Trial Court Proceedings**

On April 1, 2016, Scallon filed a verified petition for peremptory writ of mandate in superior court. The City of Los Angeles and Chief Back opposed the petition. The trial court determined that the weight of the evidence supported Chief Beck's decision to sustain the misconduct counts and issue an official reprimand and thus denied the petition.<sup>6</sup> During the proceedings, Officer Keortge testified that "the plan was made that if . . . [Ocana] came down to the rooftop level that we were going to go hands-on.'" However, the trial court noted, "[t]here is no evidence deployment of a [T]aser was any part of that tactical plan. To the contrary, the plan for the [T]aser (as described in the FID Report and noted in the Use of Force Review Board Minority Opinion) was to deploy the [T]aser if and when Scallon

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<sup>6</sup> The trial court also expressly rejected Scallon's argument that using a Taser to prevent flight, rather than to prevent violence, was within LAPD policy. The trial court noted it had not been shown a policy "that says it's okay to use a [T]aser to prevent flight because when [Ocana] was heading back up the ladder, he wasn't going to be in a position to hurt anybody. He was just going to be in a position to inconvenience a large number of firemen and a large number of police officers who had a lot better things to do that day than to babysit . . . [Ocana]. But he wasn't posing a threat to anybody. And if I had evidence from [Sergeant] Lim or from another one of the experts that says, yes, it's perfectly acceptable to use a [T]aser to prevent flight provided there's . . . no danger to anybody or the suspect himself, that's fine. But I don't have that."

put up a fight: ‘[b]ased upon intelligence that [Ocana] had a history of fighting with the police, Officer Scallon possessed the TASER as an option to deal with a *potential altercation*.’ ”

In short, the trial court found that Scallon did not follow the tactical plan. “[He] did not wait for Officers Keortge and Hart to attempt to grab Ocana. Indeed, when [Scallon] deployed the [T]aser, they were in no position to grab Ocana. As Chief Beck noted in his decision, after the officers placed a cigarette on the parapet for Ocana to smoke, Keortge and Hart backed away to give Ocana some space. As a result, Officers Hart and Keortge were not well-positioned to grab Ocana. [Scallon] nevertheless deployed the [T]aser without any indication that Ocana would put up a fight or otherwise posed a threat to the officers.” Because Scallon failed to follow the tactical plan, deployed his Taser without any warning to the other officers, and tased Ocana while he was precariously balanced on the parapet, the trial court found that the weight of the evidence supported Chief Beck’s decision that Scallon had used tactics and force which substantially deviated from approved LAPD training.<sup>7</sup>

## **STANDARD OF REVIEW**

### **I. Scallon’s Use of Force and Tactics**

Recognizing that discipline imposed on a police officer substantially affects a fundamental vested right in public employment, the trial court was required to exercise its

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<sup>7</sup> According to the City of Los Angeles and Chief Beck, the trial court thus impliedly found that the imposition of an official reprimand as the penalty for Scallon’s misconduct was not an abuse of discretion.

independent judgment of the evidence. (See *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313-314.) Although the administrative decision in this case neither deprived Scallon of his employment by discharging him, nor had an immediate financial impact by reducing his salary or benefits, the trial court was bound by this same standard of review given that a reprimand may be considered in future personnel and disciplinary decisions and may adversely affect future opportunities for career advancement. (See *id.* at p. 316.) Thus, the trial court examined the administrative record for errors of law while conducting an independent review of the entire record to determine whether the weight of the evidence supported the administrative findings. (See *id.* at p. 313.) In so doing, the trial court had the power to draw its own reasonable inferences from the evidence and to make its own determinations as to witness credibility. (See *Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.* (2003) 107 Cal.App.4th 860, 868.)

Following a superior court's independent review of the record, the scope of review on appeal is limited. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314.) "On appeal from a decision of a trial court applying its independent judgment, we review the trial court's findings rather than those of the administrative agency. [Citation.] Specifically, we review the trial court's factual findings for substantial evidence. In doing so, we must resolve all conflicts in favor of . . . the party prevailing [before the trial court]. Further, we cannot reweigh the evidence. Thus, we do not determine whether substantial evidence would have supported a contrary judgment, but only whether substantial

evidence supports the judgment actually made by the trial court.” (*Norasingh v. Lightbourne* (2014) 229 Cal.App.4th 740, 753.)

Under this deferential standard, our analysis unfolds in two steps. “First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all reasonable inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial.” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633, italics & fn. omitted.) The testimony of a witness may be sufficient to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Moreover, a trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67-68.) “The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record.” (*Kuhn*, at p. 1633, italics omitted.)

Consequently, the question is whether any substantial evidence, contradicted or uncontradicted, supports the trial court’s conclusion that the weight of the evidence supported the hearing officer’s findings of fact. (See *City of Glendale v. Marcus Cable Associates, LLC* (2014) 231 Cal.App.4th 1359, 1385 [substantial evidence standard of review applies to both express and implied findings of fact made by trial court]; *Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407-408 [appellate court’s task is to review record and determine whether trial court’s findings, not the administrative agency’s findings, are supported by substantial evidence].) “‘We uphold the trial court’s findings unless they so lack evidentiary support that they are unreasonable.’ [Citation.]” (*Norasingh v. Lightbourne, supra*,

229 Cal.App.4th at p. 753.) We review the trial court’s legal conclusions de novo. (*Coastal Environmental Rights Foundation v. California Regional Water Quality Control Bd.* (2017) 12 Cal.App.5th 178, 190.)

## II. Scallon’s Penalty

With respect to the penalty imposed by an administrative agency, we conduct an independent review of the agency’s penalty decision, rather than any decision by the trial court, to determine whether the agency abused its discretion by imposing the discipline. (*Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279 (*Flippin*).) An agency’s penalty decision may not be disturbed unless there was “an arbitrary, capricious or patently abusive exercise of discretion by the agency.” (*Ibid.*)

“ “Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. [Citation.]” [Citation.] [¶] “In reviewing the exercise of this discretion we bear in mind the principle ‘courts should let administrative boards and officers work out their problems with as little judicial interference as possible . . . . Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere.’ ” [Citation.] “The policy consideration underlying such allocation of authority is the expertise of the administrative agency in determining penalty questions.” [Citation.]” (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 633, italics omitted.) “In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the

extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.' [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 218.)

In sum, "the penalty imposed by an administrative agency will not be disturbed in a mandamus proceeding absent a manifest abuse of discretion. [Citation.] 'It is only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown. [Citations.]" [Citation.]" (*Flippin, supra*, 148 Cal.App.4th at p. 283.) "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the administrative body acted within the area of its discretion." (*Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 107.)

## DISCUSSION

### I. Scallon's Use of Force and Tactics

As noted above, pursuant to LAPD protocol, a Taser "may be used on suspects who are violent, or who pose an immediate threat to themselves or others," when the officer believes that attempts to subdue the suspect with other tactics have been or will likely be ineffective in the situation or there is a reasonable belief that it will be unsafe for officers to approach within contact range of the suspect. However, protocol also instructs that, in general, an officer should avoid using a Taser when the suspect is in danger of falling, which would likely result in death or serious bodily injury.



Here, Scallon was the SWAT team leader and was solely responsible for using the Taser. Scallon was told that Ocana was known for being a climber and for fighting with officers. Scallon also made sure that Officers Hart and Keortge were tied-off to LAFD truck ladders so they would not fall over the edge of the building, even though he knew there was an airbag in the parking lot below.<sup>8</sup> The tactical plan for taking Ocana into custody was that Officers Hart and Keortge would move forward and grab hold of Ocana if the opportunity presented itself. The Taser was to be deployed if necessary to quell a potential altercation with Ocana. Indeed, as Scallon acknowledged, “the fight might be on once we go put hands-on.”

Chief Beck concluded that—despite the LAPD’s explicit Taser protocols—Scallon used his Taser when Ocana was in a position to fall off the roof, which could, and did, lead to Ocana’s death. According to the trial court, the weight of the evidence supported Chief Beck’s determination that Scallon’s use of force had substantially deviated from approved LAPD training. The trial court’s finding is supported by substantial evidence. Indeed, Scallon’s Taser deployment deviated from general LAPD protocol and training, as well as the specific tactical plan devised on May 24, 2014. With respect to LAPD protocol, there is no evidence

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<sup>8</sup> Although Scallon later testified that the airbag was flush against the building when he accessed the roof, the trial court noted that the presence of the airbag did not eliminate the risk of serious injury to Ocana. “[Scallon] could see that Officers Hart and Keortge were ‘tied off’ to LAFD truck ladders to prevent them from falling off of the rooftop. He therefore knew or had reason to know that a fall from the rooftop posed a risk of serious injury.”

Ocana was violent with police officers or fire personnel that day or that he posed an immediate threat to himself or others. When Ocana suddenly grabbed a rung of the billboard ladder and started to pull himself towards it, Scallon, without warning, deployed his Taser in order to incapacitate Ocana and prevent him from climbing back up the ladder. Given that Ocana was known to be a climber and, as Scallon acknowledged, had already traveled to the top of the billboard and back down the ladder at least twice that day without incident, we cannot say that grabbing the rung of the ladder posed an immediate threat to Ocana's safety, or anyone else's for that matter.<sup>9</sup>

Scallon's Taser deployment also deviated from LAPD training. Scallon knew that an officer should avoid using his or her Taser when a suspect is in an elevated position and in danger of falling in a manner that would likely result in death or serious bodily injury. Despite this training, Scallon chose to deploy the Taser when Ocana was on the parapet ledge, reaching away from the rooftop and over a parking lot 15 feet below—a decision that placed Ocana at risk of serious injury or death from a fall off that ledge. As noted by the trial court, the presence of an airbag did not eliminate the risk of serious injury, a fact Scallon knew or had reason to know. That Officers Hart and Keortge remained tied off to fire truck ladders to prevent them from falling confirms the court's finding.

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<sup>9</sup> Even if Ocana's climb back up the billboard ladder did in fact pose an immediate threat to his safety, Scallon's Taser use still violated LAPD protocol. Although Scallon knew that officers had missed an opportunity to take Ocana into custody when he previously came down the billboard ladder, there is no evidence that officers made any actual attempt to subdue him.

Scallon's Taser use also deviated from the specific tactical plan in place that day. In order to take Ocana into custody, Officers Hart and Keortge were supposed to go "hands on" and grab hold of Ocana. As the trial court noted, the goal was to prevent Ocana from re-ascending the billboard and the tactical plan for achieving the goal was to have the officers move forward and grab Ocana if and when the opportunity presented itself. Scallon's Taser deployment was not part of the tactical plan. Rather, Scallon was to use his Taser only in case of a potential altercation or fight.<sup>10</sup> Given that the officers had yet to attempt to grab Ocana, there was no reason to believe the tactical plan would be ineffective. Nor was there reason to believe it was unsafe for the officers, who were armed and tied-off for their safety, to approach Ocana. Nevertheless, Scallon deployed his Taser before the officers made any attempt to grab Ocana. Indeed, Scallon deployed his Taser without warning and when the officers were not well-positioned to grab Ocana.

The question on appeal is whether the evidence reveals substantial support—contradicted or uncontradicted—for the trial court's finding that the weight of the evidence supported Chief Beck's decision to sustain the two misconduct counts as

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<sup>10</sup> During the FID investigation, Scallon said the tactical plan was to take Ocana into custody by having Officers Hart and Keortge grab him once he came down off the billboard ladder. Officer Keortge's description of the tactical plan was that he and Officer Hart would move forward and grab Ocana to prevent him from climbing back up the ladder. In fact, Scallon told the officers that if Ocana tried to go back up the ladder, "their primary mission was to put hands on the suspect and hold on to him."

well as the penalty of an official reprimand. (See *Richardson v. City and County of San Francisco Police Com.* (2013) 214 Cal.App.4th 671, 692.) We will uphold the trial court's findings unless they so lack evidentiary support that they are unreasonable. (See *ibid.*) Given the quantum of evidentiary support cited by the trial court in this case, the court's findings were not unreasonable. Consequently, we uphold the trial court here.

## **II. Scallon's Penalty**

Scallon argues the imposition of an official reprimand constituted an abuse of discretion. In sum, Scallon argues that the penalty should not have been imposed because there was no misconduct. However, as discussed above, substantial evidence supports the misconduct findings. Furthermore, the official reprimand was not "an arbitrary, capricious or patently abusive exercise" of Chief Beck's discretion to impose discipline. (See *Flippin, supra*, 148 Cal.App.4th at p. 279.) Here, Scallon's commanding officers recommended that Chief Beck sustain the misconduct allegations against Scallon and that he officially reprimand Scallon. After Chief Beck issued an official reprimand, the hearing officer concluded that this penalty was not warranted because, according to the hearing officer, Scallon's actions did not constitute misconduct. Chief Beck subsequently rejected the hearing officer's conclusions in toto. "If reasonable minds may differ with regard to the propriety of the disciplinary action, no abuse of discretion has occurred. [Citation.]" (*Flippin*, at p. 279.) In this case, reasonable minds did in fact differ as to the propriety of Scallon's discipline. Thus, we cannot say that an abuse of discretion occurred here.

## **DISPOSITION**

The trial court's judgment is affirmed, as is the penalty imposed by the administrative agency.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

I concur:

CURREY, J.\*

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\* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BENDIX, J.

I concur. Los Angeles Police Department (LAPD) Chief of Police Charlie Beck (Chief Beck) determined that when Officer Stephen Scallon (Scallon) tased Carlos Ocana (Ocana), who then fell to his death from above a rooftop, Scallon used tactics and force that substantially deviated from approved LAPD training and the tactical plan. Chief Beck then issued a finding of misconduct and officially reprimanded Scallon. In Scallon's reply brief, he concedes he is not challenging the penalty itself, apart from his claim that substantial evidence did not support the finding of misconduct in the first place. Exercising independent review, the trial court agreed with Chief Beck's decision.

Whether we agree with Chief Beck's decision is not the question before us. The applicable standards of review set the agenda for appellate review. Thus we review the trial court's findings for substantial evidence and make all inferences in favor of the judgment, and as my colleagues explain, this is true even if substantial evidence would have supported a contrary decision.

That being said, the scene Scallon encountered was highly volatile. The officers suspected Ocana was under the influence of drugs or suffered from mental illness. Scallon was concerned Ocana was suicidal. Ocana had resisted the officers' attempts to get him down from atop the billboard, where he appeared to be rocking and nodding off. He had a prior history of resisting arrest even when handcuffed. True, there was substantial evidence that Scallon's decision to employ the Taser to prevent Ocana's falling or jumping was out of policy. One, however, cannot help but ponder whether Chief Beck's finding of

misconduct exacts unusual predictive powers from officers in volatile settings where almost all strategies present serious risk.

BENDIX, J.